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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 761

UNITED STATES OF AMERICA, *Ex Rel.* MURRAY BRENSILBER, and EMANUEL THEBNER, and MURRAY BRENSILBER and EMANUEL THEBNER, on their own behalf,

Petitioners,

v.

BAUSCH & LOMB OPTICAL COMPANY, CARL ZEISS, INC., M. H. EISENHART, CARL L. BAUSCH and THEODORE B. DRESCHER.

BRIEF IN OPPOSITION ON BEHALF OF BAUSCH & LOMB OPTICAL COMPANY, M. H. EISENHART, CARL L. BAUSCH AND THEODORE B. DRESCHER

Opinion Below

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 267-269) is reported in 131 F. (2d) 545.

Jurisdiction

The judgment of the Circuit Court of Appeals sought to be reviewed was entered November 23, 1942 (R. 270).

Petitioners invoke the jurisdiction of this Court under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

Whether, upon the facts in this case, the court below erred in unanimously affirming a summary judgment for respondents in an action brought by informers under Sections 3490-3494 and 5438 of the Revised Statutes (31 U.S.C.A., Sections 231-235), where no cause of action was alleged, and both courts below have found and the record shows that no false, fictitious or fraudulent claims were made upon or against the United States.

Statutes Involved

The action is brought under Sections 3490-3494 and 5438 of the Revised Statutes (31 U.S.C.A., Sections 231-235), sometimes known and referred to herein as the False Claims Statute (Appendix, pp. 25-7).

Statement

This is a civil action for damages and penalties, alleged to aggregate more than $40,000,000, brought by two lawyers on their own behalf and on behalf of the United States under the False Claims Statute (R. S. 3490-3494; 5438), which statute was recently considered by this Court in *United States ex rel. Marcus* v. *Hess* (U. S.), 87 L. Ed. 374 (decided January 18, 1943).

This action was instituted a year and a half after the final disposition in 1940 of certain criminal and civil anti-trust proceedings brought by the Department of Justice.

In those proceedings the Government attacked the validity of certain agreements between Bausch & Lomb and Carl Zeiss, of Jena, Germany (not sued herein), dealing with the manufacture and sale of military optical instruments under patents owned by Zeiss.* The anti-trust proceedings terminated in pleas of *nolo contendere*, payment of fines, and the entry of a consent decree (R. 243-8).** Government counsel in charge of those proceedings, and under whose personal supervision the Grand Jury investigation preceding them was made, expressly stated in open court at the time of acceptance of the pleas, in response to a direct question by the Court, that no charge of fraud was involved in connection with the acts complained of in the indictment (R. 24). The indictment, equity complaint, bills of particulars and exhibits, and consent decree are in the record (R. 86-248) and were before the courts below.

Petitioners concede that their case is based solely on the record in the anti-trust proceedings. Yet, when they served their complaint, long after the anti-trust proceedings had been terminated and ten days after Pearl Harbor (when these respondents were still more deeply concerned with war production), petitioners did not adhere to the allegations made in those proceedings. Instead, petitioners distorted the plain provisions of the written agreements involved in those proceedings and made other false allegations. Thus, the complaint (R. 3-10) departed from the facts of record in the anti-trust proceedings (on which

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*These agreements made it possible for Bausch & Lomb to obtain for the use of the United States Government the patented and unpatented technical advancements of Zeiss in the field of military optical instruments and resulted in great benefits in the improvement of such instruments supplied to the Government (R. 30).

**The agreements had been suspended prior to the entry of the pleas and decree in the anti-trust proceedings (R. 246). These respondents settled those proceedings largely because they were too preoccupied with the increasing American armament program to prepare for and participate in a trial of the issues (R. 23-4, 30).

alone it was based) and, in an attempt to frame a complaint against Bausch & Lomb under the False Claims Statute, falsely alleged that under the agreements, Bausch & Lomb agreed to and did add 20% to its prices on sales by it of military optical instruments to the United States Government, and agreed to and did pay the amount of such markup to Carl Zeiss of Jena.* (Compare R. 25-7 and 233-6 with R. 5-8 and 221-2.) This was the basic charge of the complaint and its only material allegation of fact under the False Claims Statute.

Recognizing the gravity of charges that they had conspired to defraud and had defrauded their Government, and desiring to obtain immediate and definitive relief against the false charges so made in the complaint, these respondents moved for an order dismissing the complaint for failure to state a cause of action under the statute and for summary judgment.** Respondents submitted affidavits in support of the motion (R. 17-33), made on knowledge, setting forth facts showing that there had been no fraud upon, or submission of fraudulent claims to, the United States. The affidavits further emphasized the critical importance of immediate disposition of the case to avoid interruption of work for the Government (R. 31).***

Before the return day of the motion, petitioners served a purported amended complaint (R. 78-85), withdraw-

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* The complaint contained other distortions of the facts of record in the anti-trust proceedings; for example, that the agreements in question (1) were made between respondent Bausch & Lomb and respondent Carl Zeiss Inc., and (2) that the individual respondents were officers and directors not only of Bausch & Lomb, but also of Carl Zeiss Inc.

** These respondents also attacked the venue of the action, but requested the district court to decide the case on the merits. Neither of the courts below passed upon the venue question.

*** Bausch & Lomb's contribution to our war effort has been repeatedly recognized. (See, among others, the award to it of the Navy "E" for achievement on July 26, 1941 (*New York Times*, July 26, 1941) and the award to it of the Joint Army and Navy "E" on September 7, 1942 (*New York Times*, September 7, 1942). It was the first company to receive the Navy "E" with Star (*New York Times*, May 19, 1942) and now has a total of three stars for continued excellence of production.)

ing the above mentioned allegations. Their falsity thus stood admitted.* In this document petitioners merely plagiarized the Government's charges in the anti-trust proceedings and added conclusory allegations of fraud substantially in the words of the False Claims Statute.

Respondents took immediate steps to prevent the petitioners from delaying final decision by this manoeuver. The purported amendment was rejected because it was untimely under Rule 15(a)** of the Federal Rules of Civil Procedure (R. 51, 54-6). Respondents then moved for an order declaring the purported amended complaint a nullity and not a proper amendment as of course under Rule 15(a); and, in addition, that leave to amend in accordance therewith, if requested, should be denied. Respondents asked, however, that the purported amended complaint be considered by the district court, on the motion for summary judgment, as an admission by petitioners of the falsity of the charges in the original complaint. In the event that amendment were permitted, respondents, in the alternative, renewed the motion to dismiss and for summary judgment.

The district court held the attempted amendment a nullity, and denied leave to amend in accordance there-

* Although no explanation of the distortion of facts in the complaint was ever offered below, the petitioners now assert that it was an inadvertence (Pet. pp. 8, 20). For two lawyer-plaintiffs (one of whom was the sole counsel of record in the district court) to make so many inadvertent mistakes in plagiarizing matters of record in a suit by which they sought to recover more than $20,000,000 for themselves is rather unusual.

The amount of the claim itself also shows a reckless disregard for facts. The royalty record (R. 144) shows that the amount of $8,000,000 claimed by petitioners as *damages* for the year 1938 alone (R. 8-9) *exceeded* the *total sales* of military optical instruments by Bausch & Lomb in that year by over 800%. The ingenuous device of expanding the period covered by this claim in the purported amended complaint to include the last two months of 1937 (R. 84) only makes the distortion more obvious.

Such disregard of the responsibilities of verification by counsel imposed by Rule 11 of the Federal Rules (Appendix p. 28) furnishes some measure of the weight to be given to the conclusory allegations of fraud in the purported amended complaint as against the statements on knowledge in the respondents' affidavits.

** Appendix pp. 28-9.

with on the ground that the proposed amended complaint did not state a cause of action under the statute. It thereupon dismissed the complaint and granted summary judgment to respondents (R. 254-62). The Circuit Court of Appeals unanimously affirmed, *per curiam*, the orders and judgment of the District Court, being of the opinion that, whether amendment should have been permitted or not, respondents were entitled to summary judgment since this "action is of precisely the sort which a motion for summary judgment was intended to nip in the bud" (R. 267-9).*

ARGUMENT

POINT I

The decision below was correct; the proposed amended complaint fails to state a cause of action under the False Claims Statute.

Petitioners disavow the complaint with its false allegations. They stand on the purported amended complaint (R. 78-85). The courts below were clearly right in treating the purported amended complaint as insufficient to

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* While the Circuit Court of Appeals found it unnecessary to decide whether the time for petitioners to amend as of course had expired, since in any event summary judgment for respondents was required, the district court appears to have been correct in holding that the attempted amendment was a nullity because respondents, by moving for summary judgment, had interposed a "responsive pleading" to the complaint within the meaning of Rule 15(a), after which petitioners lost their right to amend as of course. In so ruling, the district court followed the only decision on the point, *Triangle Conduit & Cable Co.* v. *Nat. Elec. Products Corp.*, 38 F. Supp. 533 (D. Del., 1941), rev'd on other grounds, 125 F. (2d) 1008 (C.C.A. 3, 1942). Compare *U. S.* v. *Newbury Mfg. Co.*, 123 F. (2d) 453 (C.C.A. 1, 1941), which deals, however, with a motion to dismiss rather than a motion for summary judgment, to which a different rule is applicable.

In further denying leave to amend where the proposed amendment does not state a cause of action and would, therefore, merely require the court to entertain and grant a subsequent motion to dismiss, the district court followed the salutary doctrine applied in *Welch* v. *T. W. Warner Co.*, 47 F. (2d) 231 (S. D. N. Y., 1930, aff'd 47 F. (2d) 232 (C.C.A. 2, 1931), and other cases.

block summary judgment, as they were plainly right in granting summary judgment for respondents on the entire record (Point II, *infra**). Consideration of the record throws light on the reasons for petitioners' failure to comply with the fundamental rules of pleading discussed below. They could not plead the necessary factual allegations of the making of false or fraudulent claims by respondents because the record shows that no such facts exist. Thus, insistence on the insufficiency of the pleadings involves no mere technicality; it is necessary to protect these respondents from harassment and the courts from further consideration of utterly unfounded and insufficient allegations.

To state a cause of action under the False Claims Statute, facts, not conclusions of law, must be alleged to show that a false, fictitious and fraudulent claim against the United States has been actually paid or allowed. *United States ex rel. Kessler* v. *Mercur Corp.*, 13 F. Supp. 742 (S.D. N.Y., 1935), aff'd 83 F. (2d) 178 (C.C.A. 2, 1936), cert. den. 299 U.S. 576 (1936); *Cf. United States ex rel. Marcus* v. *Hess, supra.*

Nor is it enough to plead generally in the language of the Statute. *Glenn Coal Company* v. *Dickinson Fuel Co.*, 72 F. (2d) 885 (C.C.A. 4, 1934); *Lipson* v. *Socony-Vacuum Corp.*, 76 F. (2d) 213 (C.C.A. 1, 1935), appeal dism'd. by stip. 301 U. S. 711 (1937); *Baran* v. *Goodyear Tire & Rubber Co.*, 256 Fed. 571, 574 (S.D. N.Y., 1919); *McJunkin* v. *Richfield Oil Corp.*, 33 F. Supp. 466 (N.D. Calif., 1940); *Black & Yates, Inc.* v. *Mahogany Association, Inc.*, 34 F. Supp. 450 (D. Del., 1940), reversed on other grounds, 129

* It is also shown in Point II that the question presented by the Petition is not open on the record.

F. (2d) 227 (C.C.A. 3, 1942), cert. den. 87 L.E. 49 (Oct. 26, 1942). If facts to corroborate conclusory charges are not alleged, the court may properly take the view that the failure of the pleader to allege these facts creates the presumption that they do not exist. *Sun Oil Co.* v. *Blevins*, 29 F. Supp. 901 (W.D. La. 1939), aff'd 110 F. (2d) 566 (C.C.A. 5, 1940).

Since actions under the False Claims Statute are in essence actions for fraud (*United States ex rel. Marcus* v. *Hess, supra*), the pleader must comply with Rule 9(b) of the Federal Rules of Civil Procedure, which requires that in all averments of fraud the circumstances constituting the fraud must be stated with particularity.* General, unspecific and unsupported charges of fraud are insufficient. *Holland* v. *Majestic Radio & Tel. Corp.*, 27 F. Supp. 990, 992 (S.D. N.Y., 1939); *Zimmerman* v. *National Dairy Products Corp.*, 30 F. Supp. 438 (S.D. N.Y., 1939); *Curacao Trading Co. Inc.* v. *William Stake & Co. Inc.*, 5 F. R. S. 64 (S.D. N.Y., 1941, not officially reported); *Stanfa* v. *Bynum*, 37 F. Supp. 962 (W.D. La., 1941); see *Murphy* v. *Mitchell*, 249 Fed. 499 (N.D. N.Y., 1918.)

Measured by these established requirements, it seems obvious that even were amendment otherwise proper (which we do not concede) the proposed amended complaint could not be sustained. Nowhere does it allege facts constituting a single instance in which a false, fictitious or fraudulent claim was submitted to the United States by these respondents and allowed or paid. It also fails to allege such an instance with respect to Carl Zeiss of Jena (not named as a defendant in the action). The conclusory allegation that Bausch & Lomb and Carl Zeiss of Jena sold military optical instruments to the United

* See Appendix p. 28.

States "at arbitrary, artificial and unreasonable and non-competitive prices agreed upon" between them, certainly does not constitute the required specification, however proper the allegation might have been in an indictment under the Sherman Act or the Wilson Tariff Act, to which different rules of pleading apply. Similarly defective is the charge that Bausch & Lomb (not Zeiss) submitted "bids" to the United States "at prices that pretended to be and were represented to be, and which the Government * * * believed to be, the normal, prevailing and competitive prices for such * * * instruments", but which in fact were not, "but were in excess" of such prices. See *Standard Oil Co.* v. *United States,* 283 U. S. 163, 172 (1931). This allegation cannot be considered the statement of circumstances constituting fraud with the particularity required by Rule 9(b). The allegation immediately following does not even charge that "*such* bids" were accepted by the Government, but only that "*various* bids, submitted by the defendant Bausch & Lomb at various times", were so accepted, the dates, prices, amounts and other particulars of which are unknown. Information sufficient to claim damages in the astronomical amounts demanded should, if it existed, have permitted the specification of at least one instance of the misconduct charged as an earnest of petitioners' right to proceed. Finally it is alleged, in the words of the statute, that "the defendant * * * presented for payment and approval * * * bids, claims, invoices, bills, vouchers and statements and accounts" knowing the same to be "excessive, false, fictitious and fraudulent by reasons aforesaid, in that said defendants added to the normal, prevailing and competitive prices, an arbitrary amount pursuant to the conspiracy * * *", and that the said claims, etc. were paid and satisfied. But, unless suits such as this are to enjoy

some immunity from the rules of pleading enforced in all other fraud actions to prevent imposition on the courts, such conclusory statements, in the statutory language, are wholly insufficient.

It is apparent, therefore, that the District Court correctly held the purported amended complaint insufficient. Whether the amendment was recognized or allowed and then dismissed, or rejected at the outset, was immaterial. Petitioners have made two attempts, on the basis of the records in the anti-trust proceedings, to demonstrate that they have a case within the statute on which they rely. In their first attempt they concededly distorted the facts; in their second, they have failed to comply with settled requirements applicable to pleading in such actions and have failed to allege a cause of action. The courts below correctly concluded that this failure was due to the absence of facts to support the serious charge made. Summary disposition was required; this litigation does not deserve to be further prolonged.

POINT II

The question presented by petitioners is not open for consideration. In any event summary judgment for respondents was required since petitioners failed to present any genuine issue of fact.

Briefly stated, the question presented by petitioners (Pet. p. 2) is whether an action lies under the False Claims Statute "where the record before the Court shows" that Carl Zeiss, of Jena, pursuant to agreements with Bausch & Lomb, "when invited by the United States to make a bid, was required to submit, and did in fact

submit excessive prices (so-called "protective offers") fixed by the American corporation" (Bausch & Lomb).*

Before passing to the fundamental misconstruction of the record embraced in petitioners' statement of the question, it should be noted that the question is not open on the record since no such question is tendered by or within petitioners' pleadings and no such claim was made in the courts below.

It is unnecessary to look to the complaint, which petitioners have abandoned. Its basic charge, that Bausch & Lomb added 20% to its prices on sales of military optical instruments to the United States, is concededly false.

The proposed amended complaint, the material and legally insufficient allegations of which are set forth under Point I, *supra,* likewise does not make the charge tendered for review. It carefully distinguishes between Carl Zeiss, Inc., a respondent to the instant petition, and Carl Zeiss, of Jena, not named as a defendant in the action (R. 79-80). The allegation with respect to the former is not that it bid and submitted excessive prices, but expressly that, pursuant to the conspiracy, it *refused* to bid (R. 81). The only allegation charging affirmative action with respect to the United States by Carl Zeiss, of Jena, is that

* In addition to the fundamental errors of fact embraced in petitioners' statement of the question presented which we point out *infra,* pages 12-18, there are several others which deserve mention. These respondents have not admitted that the patent licensing agreements with Zeiss were unlawful. Their pleas of *nolo contendere* to the anti-trust indictment did not constitute such admissions. See *Twin Ports Oil Co.* v. *Pure Oil Co.,* 26 F. Supp. 366 (D. Minn., 1939); *Barnsdall Refining Corp.* v. *Birnamwood Oil Co.,* 32 F. Supp. 308 (E. D. Wis., 1940). The consent decree in the equity anti-trust case (R. 243-8) expressly recognizes the respondents' claim of innocence of violation of law (R. 243) and Section 5 of the Clayton Act (15 U.S.C.A., Sec. 16) provides that such consent decrees are not to be treated as admissions.

Also, the question as stated in the petition infers that summary judgment was granted by the courts below solely on the ground that "the complaint and the unlawful agreements showed no false representations in deceit of the United States" and that the lower courts did not consider the bills of particulars and exhibits in the anti-trust proceedings. The fact is, of course, that the summary judgment for respondents was necessarily based on the entire record before the courts below.

"• • • Bausch & Lomb and Carl Zeiss, of Jena, • • • by concerted action, • • • sold, shipped and delivered military optical instruments to the Government of the United States at arbitrary, artificial and unreasonable and non-competitive prices agreed on by the defendant Bausch & Lomb with Carl Zeiss, of Jena • • •" (R. 81). It is not alleged that Zeiss ever received payments from the United States Government for the sale of military optical instruments, but only that Bausch & Lomb did (R. 83). The remaining allegations, by reference to Bausch & Lomb, or to "the defendants," in terms exclude Carl Zeiss, of Jena (R. 83-5). The proposed amended complaint is not predicated upon the claim of the use of "protective offers" by Carl Zeiss of Jena to throw business to Bausch & Lomb (now asserted in the petition), but wholly on alleged sales by Zeiss and Bausch & Lomb at what are claimed to be fraudulent prices, thus making their several claims fraudulent. What petitioners seek is a review of a charge which they have not even pleaded, an omission which is fatal to review here. *Denver Stockyard Co.* v. *United States,* 304 U. S. 470, 485 (1938).

This obstacle to review is reinforced by the fact that no such claim was made in the courts below—it is obviously a new theory presented for the first time in the petition. There would appear to be no reason peculiarly applicable to *qui tam* cases for departing from the ordinary rule that this Court will not consider questions not submitted by petitioners to the courts whose judgments they attack. *Helvering* v. *Minnesota Tea Co.,* 296 U. S. 378, 380 (1935); *Helvering* v. *Tex-Penn Co.,* 300 U. S. 481, 498 (1937); *Duignan* v. *United States,* 274 U. S. 195, 200 (1927); *Blair* v. *Oesterlein Co.,* 275 U. S. 220, 225 (1927).

Even if these familiar objections to review are disregarded, it is entirely clear that the decision below was correct in granting summary judgment to the respondents. The record is barren of any facts to support the assertions in the petition that the agreements between Bausch & Lomb and Carl Zeiss of Jena, or conduct under them, resulted in fraud upon the United States or submission of fraudulent claims to the United States. Thus, the petition tenders a wholly hypothetical question which this Court should not consider.

The remedy of summary judgment is provided to permit speedy determination on motion and without the delays and expense of trial of cases where the record shows that there is no genuine issue of fact to be tried. *Altman* v. *Curtiss-Wright Corporation,* 124 F. (2d), 177, 180 (C.C.A. 2, 1941); *Prudential Ins. Co. of America* v. *Goldstein,* 43 F. Supp. 767, 768 (E.D. N. Y., 1942). Here the courts below had before them the complete records in the anti-trust proceedings upon which, alone, petitioners' action was predicated. Affidavits on knowledge submitted by these respondents (R. 17-33) showed not only the falsity of the complaint (which petitioners immediately admitted by their attempt to amend) but asserted and set forth facts showing that Bausch & Lomb had not submitted claims within the statute. Even if objections to the sufficiency of the pleadings (Point I, *supra*) are disregarded, the petitioners' general allegations, unsupported by the anti-trust source material, were shown to be without substance in fact. It is the purpose of summary judgment to cut through such sham allegations without trial. Upon a motion for summary judgment, the court may properly accept statements of fact in affidavits made on knowledge against any mere conclusory allegations made on infor-

mation and belief in a pleading or elsewhere. This is the clear import of Rule 56(e), 28 U.S.C.A., following §723c*, (see *Gnozzo* v. *Marine Trust Company of Buffalo*, 258 App. Div. 298 (1939), aff'd. without opinion, 284 N. Y. 617). This is all the more true where, as here, the petitioners conceded the falsity of charges of fraud in their original complaint. In the balance of this Point we shall show in detail how completely the record fails to show any facts supporting the assertions of fraudulent conduct which are made for the first time in the petition.

Petitioners' new theory of their case requires that the record present a triable issue on each of the following points: (1) that competitive bids were necessary on military optical instruments; (2) that Carl Zeiss, of Jena, was invited by the United States Government to bid on the sale of such instruments in competition with Bausch & Lomb; (3) that when invited to bid Zeiss was required by agreement to quote prices, which included an amount (a so-called "protective offer") named by Bausch & Lomb, to be added to the price which Zeiss would otherwise have charged the Government for the particular instrument; (4) that, in fact, Zeiss quoted such prices to the United States Government; (5) that a contract was awarded on the basis of such a quotation; and (6) that a claim based on such contract was made upon and paid by the United States. The record is completely barren of any facts supporting any of these points.

At the outset of a scrutiny of the record, it is to be noted that the provisions of the agreements between Bausch & Lomb and Zeiss requiring "protective offers" under certain circumstances, upon which petitioners rely, were inserted in 1925 and eliminated in 1926 (R. 27, 233-4, 235-6, 241). No facts are alleged or contained in the record showing that this provision continued in effect

* Appendix p. 29.

thereafter.* On the contrary, the record specifically shows that "protective offers" were never used in connection with any transaction with the United States Government (R. 29).

The sole sources on which petitioners rely to gloss over the deficiencies in their pleadings do not contain any facts in support of the alleged fraud which petitioners now claim. Such facts are not alleged in the indictment in the anti-trust proceedings nor in the complaint in the equity anti-trust case. The bills of particulars, which contain the details of the Government's allegations in the indictment, obtained after an exhaustive investigation, mention only one sale (by Bausch & Lomb) to the United States Government, and only four other instances of any dealings or communications of any kind involving the United States Government in connection with Zeiss instruments. Analysis of these five instances shows that none supports petitioners' present claim.** In addition, respondents'

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* The 1926 agreement (R. 238-42) contains no provision for "protective offers." Indeed, it expressly eliminates that provision (R. 241). In the teeth of such express agreement by the parties, the provision in the 1926 agreement that the parties shall "endeavor to give due consideration to one another's interests" cannot be read as importing into the agreement the very provision which it eliminates. While the Government's indictment and equity complaint allege a continuance in general terms, no facts in support thereof are alleged in the indictment or equity complaint and in no instance after 1926 does the Government's bill of particulars refer even to a foreign transaction involving a "protective offer". Communication with Zeiss on such foreign transactions is to be regarded only as compliance by a patent licensee with the provision for cooperation in the 1926 agreement. In these circumstances the courts below were entitled to accept the factual statements on knowledge in these respondents' affidavits, rather than any vague and unsupported general claims on behalf of petitioners. Respondents had not, of course, conceded the correctness of the allegations in the indictment or the equity complaint (R. 23-4, 30, 243). The record thus does not contain any facts showing continuance of the "protective offer" provision after 1926; even if it had, it would not affect the result since it is entirely clear on the record that "protective offers" were never used in connection with any transaction with the United States (R. 29).

** The first concerns the importation, on or about September 15, 1938, of a stereo-telemeter by Bausch & Lomb from Carl Zeiss, of Jena, which was sold by Bausch & Lomb to the United States Government for approximately $24,460 (R. 118-9, 142-3). It is not included in the bill of particulars as an instance of joint action but only in support of the jurisdiction of the Southern District over commerce passing through it (*Cf.* R. 118-9, 142-3). There is no indication whatever that this transaction was improper, the Government did not claim it to be, and the respondents' affidavits establish its propriety (R. 28).

The second, in 1929 (R. 138), was alleged by the Government to be one of three instances of Zeiss' refusal to sell military optical instruments in the

affidavits show (R. 28-9) that in the one instance in which a sample Zeiss instrument was supplied directly to the United States Government (not included in the Government's bill of particulars and not referred to by these petitioners) no "protective offer" was involved.

Thus the record is barren of any facts to show the actual making of any "protective offer" by Zeiss to the United States and *a fortiori* that there were "protective offers" by Zeiss which resulted in the award of any contract to Bausch & Lomb. Thus the "protective offer" provision, in effect only between 1925 and 1926, resulted in no conduct or claims affecting the United States which could possibly be regarded as within that provision. The prompt excision of the provision by the parties makes

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United States unless Bausch & Lomb consented (only this one involving the Government); there was no claim that there was any "protective offer." On the contrary, it indicates that Zeiss submitted no offer at all, much less a "protective offer." Whatever may have been the relevance of such conduct to an anti-trust case, it does not support petitioners' claim that a fraudulent claim was made upon the United States.

The third, fourth and fifth (R. 138-9) are stated to be instances in which Zeiss offered to sell military optical instruments for use in the United States with the consent of Bausch & Lomb. Of the total of four such cases given (R. 139), one does not concern the Government. As to Items "(ii)" in 1928 and "(iii)" in 1935 in the bill (R. 139), there is no indication that they involved "protective offers" by Carl Zeiss, of Jena, and the Government, in the anti-trust proceeding, made no claim that they did; nor, for that matter, did it make any such claim with regard to Item "(i)" (R. 139), which refers to Exhibit U (R. 188-92). Exhibit U is a copy of a letter, dated March 7, 1928, from Bausch & Lomb to Carl Zeiss, of Jena. It appears therefrom that the American Embassy in Berlin, presumably on behalf of the Navy Department, inquired at Nedinsco (affiliated with Zeiss) with regard to the supply of three military optical instruments with accessories, in which modern type Bausch & Lomb had unsuccessfully attempted to interest the authorities at Washington. Zeiss was apparently of the opinion that, if the Embassy was interested in the instruments, it might redound to Bausch & Lomb's benefit in the future, and that Bausch & Lomb should enter into an agreement with Nedinsco with respect thereto. "Zeiss will quote date of delivery, usual foreign countries' price, delivered f.o.b. Rotterdam. 10% for you * * *." As appears from the cablegram of March 7, 1928 (R. 191), the quoted price was to include the commission. There is no evidence that the Government sought competitive bids. On the contrary, it appears that Bausch & Lomb was not invited to bid and that the inquiry abroad represented a new development in departmental policy. Furthermore, there is no indication that the quotation was ever actually made, and certainly none that the transaction matured into a sale and a subsequent claim on the Government. No consummation of any such transaction is reflected in the bill of particulars (*Cf.* R. 142-3). Respondents' affidavits indicate that this transaction did not in fact materialize (R. 28-9). Since the price to be quoted was the "usual" price which Zeiss quoted foreign countries, and included a commission of 10% for Bausch & Lomb (R. 188), there would, in any event, be no basis for concluding that such a quotation, if made, involved a "protective offer" or any excessive price.

any comment on its propriety quite academic. In further support of the view that petitioners' reliance on this provision is groundless, it is to be noted that there are neither allegations nor facts indicating that Bausch & Lomb and Carl Zeiss, of Jena, were at any time requested to make offers to the United States Government in response to invitations for competitive bids or that such offers were made, or, indeed, that competitive bidding by anyone was required by law. The opposite appears to be true of military optical instruments.* In any event it is inconceivable that the United States military authorities would have looked to Carl Zeiss, of Jena, or any other foreign concern, as its source of supply for such vitally important equipment as the range finders which control the gunfire of our ships—any more than they would have had our battleships constructed on foreign ways.** The only pur-

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* Military optical instruments, being of a highly technical and specialized nature, are in a different category from much of the material which the Government purchases. Neither the Army nor the Navy is required to seek competitive bids on "ordnance." Webster's New International Dictionary, 2d Ed., defines "ordnance" as including range finders, etc., and the definition obviously is broad enough to cover all military optical instruments as defined in the complaints (R. 4, 80).

Among the statutes exempting ordnance from requirements of competitive bidding are:

As to the Army, the Act of May 11, 1908, c. 163, 35 Stat. 106, 125 (10 U.S.C.A. Sec. 1199), provides:

> "Whenever proposals are invited for the furnishing of articles of ordnance property, the character of which or the ingredients thereof are of such a nature that the interests of the public service would be injured by publicly divulging them, the Chief of Ordnance is authorized to purchase such articles in such manner as he may deem most economical and efficient."

See also Act of March 2, 1901, c. 803, 31 Stat. 895, 905, Act of June 30, 1902, c. 1328, 32 Stat. 507, 514 (10 U.S.C.A. Sec. 1201).

As to the Navy, R. S. Sec. 3721 (34 U.S.C.A. Sec. 569), provides in part:

> "* * * The provisions which require that supplies shall be purchased by the Secretary of the Navy from the lowest bidder, after advertisement, shall not apply to ordnance, gunpowder, * * *."

** Aside from the public policy affecting military optical instruments, during the past twenty years, at least, various Army and Navy appropriation acts have contained provisions manifesting the existence of a "Buy American" policy. The Act of February 28, 1931, c. 326, 46 Stat. 1431, 1450, provided in part:

> "That in the expenditure of appropriations in this Act, the Secretary of the Navy shall, unless in his discretion the interest of the

chases of Zeiss military optical instruments are shown to have been for sample purposes (R. 28). Nor is there a single fact indicating that these respondents ever made a claim containing a representation that was false. In these respects and others this case differs fundamentally from that which was recently before this Court in *United States ex rel. Marcus* v. *Hess, supra.* Here the record discloses no fraud (in the form of collusive bidding or otherwise) and, on the contrary, expressly disproves it, and the two courts below have concurred in finding it absent and that there exists no issue of fact worthy of trial. In the *Marcus* case, fraud had been found by the jury and was conceded on appeal.

There is no basis for petitioners' somewhat varied claims (*Cf.* Pet. pp. 2, 16 and 18) that there was any misrepresentation in the transactions with the United States. The record shows no instance in which a bid by Zeiss or Bausch & Lomb did influence or possibly could have influenced the bid of the other or the Government's action on any bid. There is wanting any indication that, in fact, the Government ever purchased anything from either at excessive prices or that any claim within the statute was ever submitted by either. These infirmities do not go merely to the question of damages, as peti-

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Government will not permit, purchase or contract for, within the limits of the United States, only articles of the growth, production or manufacture of the United States, notwithstanding that such articles of the growth, production or manufacture of the United States may cost more, if such excess of cost be not unreasonable."

Identical language is to be found in the following Navy Department appropriation acts: Act of June 30, 1932, c. 318, 47 Stat. 421, 441-2; Act of March 3, 1933, c. 213, 47 Stat. 1521, 1540; Act of March 15, 1934, c. 69, 48 Stat. 403, 421; Act of June 24, 1935, c. 291, 49 Stat. 398, 418.

Army appropriation acts containing provisions of similar import are: Act of June 30, 1921, c. 33, 42 Stat. 68, 90; Act of June 30, 1922, c. 253, 42 Stat. 716, 742-3, 754.

Furthermore, this "Buy American" policy is given general application by the Act of March 3, 1933, c. 212, Title 3, Section 2, 47 Stat. 1489, 1520 (41 U.S.C.A. Sec. 10a) (see also Act of June 30, 1914, c. 130, 38 Stat. 392, 399 (34 U.S.C.A. Sec. 568)).

tioners suggest (Pet. p. 20), they are basic defects in their cause of action. They required the courts below to make summary disposition of this case as they did. It would have been a travesty to interrupt the critical military production of these respondents by requiring them to submit to examinations before trial and trial (involving highly confidential work done for the Army and Navy with the obvious dangers to military security) while petitioners sought vainly for evidence to support general charges of fraud which Government counsel found absent after a Grand Jury investigation.

The failure of the record to sustain petitioners' claims of fraud is not surprising. Petitioners' charges are now based entirely on the anti-trust proceedings, since they have recanted the false charges in the original complaint. And the Government (partial beneficiary of this action) expressly disclaimed any charge of fraud in connection with the very transactions which are the sole basis of this suit. At the time the District Court was asked by counsel for the Government and for these respondents to accept *nolo contendere* pleas to the anti-trust indictment, the Court specifically asked Hon. Samuel S. Isseks, the Special Assistant to the Attorney General in personal charge of those proceedings, whether any charge of fraud was involved, and Mr. Isseks replied: "• • • There is no charge of fraud against the defendants in connection with the acts complained of in the indictment" (R. 24). The Court's question was not idle; its obvious purpose was to ascertain whether respondents' conduct justified the acceptance of mere *nolo* pleas. The representation made to the Court by Government counsel in charge of the case is entitled to great weight. The statement was made after a thorough investigation, with the aid of

Grand Jury subpoenas. It was made, moreover, by an official acting in the place of the District Attorney whose statutory duty it is to enforce the False Claims Statute by appropriate proceedings, civil and criminal, as well as the anti-trust laws. Thus, petitioners err in implying that the statement was somehow *ultra vires,* and it is hardly fair to Government counsel to imply that he was seeking to mislead the Court by using words in any technical sense when making a representation to the Court, whose purpose in asking for it he fully apprehended. We submit that the statement of disinterested Government counsel lends strong support to the decisions below. It casts the gravest doubt on the interested interpretation of the same transactions by those who made no personal investigation of them.

The moving affidavits for these respondents categorically stated that bids by Bausch & Lomb to the United States had not been participated in, or influenced by, Zeiss, and that such bids were not inflated (R. 27-33). Similarly, there were explicit statements made on knowledge that no false, fictitious or fraudulent documents had been submitted to the Government. Thus, upon the whole record, the courts below were bound to grant summary judgment for these respondents. The court below said:

> "To subject the defendants to a long harassment by examination and trial upon a certainly empty charge could serve no purpose except possibly to force them to buy their peace, an extortion against which §232 would not protect them" (R. 269).

In this case petitioners have actually done no more than replead a violation of the anti-trust laws where all the penalties provided for by those laws have been exacted.

They suggest that the remedies for violation of those laws are inadequate (Pet. p. 24) and seem to urge that this action should be maintainable to supplement the remedies provided by law. But they are pursuing no remedy authorized by the anti-trust laws, and, if those laws need additional sanctions, Congress must provide them. Congress has provided very explicitly the essentials to permit recovery in such actions as this, as this Court has recently indicated in its opinion in *United States ex rel. Marcus* v. *Hess, supra.* This case fails to meet those requirements.

POINT III

There is no conflict of decisions and the case is of no general importance.

The agency rule in conspiracy cases is entirely inapplicable here. This record contains no facts to show that Zeiss (or Bausch & Lomb) made false representations to the United States either in furtherance of an alleged conspiracy or otherwise. It is obvious that there is no conflict with the familiar decisions in this field and the failure of the experienced court below even to advert to them emphasizes the fact that petitioners are now making a fresh contention which was not made below.

Nor is there conflict between the decisions below and *McMullen* v. *Hoffman,* 174 U. S. 639, or the other cases cited on page 17 of petitioners' brief. There is not only no factual allegation of "protective offers" by Zeiss to the United States but it affirmatively appears that there was no inflation of bids by Bausch & Lomb. There was therefore wholly absent the fraud and misrepresentation which is the predicate for this claimed conflict.

Likewise there is no conflict with the recent decision in *U. S. ex rel. Marcus* v. *Hess, supra.* The court below applied to the facts here essentially the same standards which this Court applied in its decision in the *Marcus* case and it pointed out the fundamental distinction between the facts in the two cases. In the *Marcus* case there was collusive bidding and there were false statements in some if not all bids that bidding was not collusive. Fraud was found by the jury and was not denied on appeal. Here all of those elements are wholly lacking.

This case depends upon its particular and special facts and the decision below cannot affect other Government contract cases with different facts. The contractual provision principally relied upon by petitioners was in fact wholly inoperative against the United States and consideration of that provision is academic. The record gives no support to the general claim (Pet. p. 23) that colorable bids were submitted and that either party was enabled thereby to increase its bids, and the decision below cannot be regarded as upholding such a practice—particularly where no such contention was even made in the pleadings or in the courts below.

Since the Court has so recently expounded the applicable statute in *United States ex rel. Marcus* v. *Hess, supra,* there is no need to reexamine it when it was correctly applied below. While in his brief *amicus* in the *Marcus* case the Solicitor General indicated his belief that the court below erred in one portion of its opinion (in that it construed the statute as requiring proof of deceit), he does not appear to have doubted the correctness of the final result below. Indeed in a portion of his brief not quoted by petitioners (p. 45) he seems to have indicated

his belief that the decision below was correct in so far as the particular facts in the case are concerned. In any event, since the disposition of the case by the courts below was clearly correct, there is no occasion to grant review merely to consider the Solicitor General's comment, which was obviously made chiefly to preserve the right to argue for a broader construction of the statute in a proper case. The Government can always litigate the question so mooted when it arises in a proper case. Here the charge is false representation or deceit and it is immaterial to this case whether other facts going beyond deceit would fall within the statute. It would be an undue hardship on the respondents to grant review merely for the purpose of considering this criticism, when the result, in this case, would not be affected.

Furthermore, it may be noted that Congressional action to repeal the informer provision of the False Claims Statute appears to be imminent so that subsequent cases under that provision may not arise. Repeal has been requested by the Attorney General*, the House has passed the Bill (H.R. 1203) and the Senate Committee on the Judiciary has under consideration a similar Bill (S. 920), at this writing.

Conclusion

The case was correctly decided below, there is no conflict of decisions and, as the decision below depends upon the particular facts, it is of no general importance. The Court has so recently construed the same statute that no further explication is now needed. The question presented

* See letter of Attorney General Biddle to the Speaker of the House, dated August 28, 1942, included in Rep. No. 263, 78th Cong. 1st Sess.

does not appear to be open for review upon this record. We, therefore, respectfully submit that the petition for writ of certiorari should be denied.

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Counsel for Bausch & Lomb Optical Company, M. H. Eisenhart, Carl L. Bausch and Theodore B. Drescher.

SIMPSON THACHER & BARTLETT,
ALBERT C. BICKFORD,
Of Counsel.

April 16, 1943.

Appendix A

FALSE CLAIMS STATUTE

31 U. S. C. A., Sections 231-235

(R. S., Sections 3490-3494, 5438)

§ 231. LIABILITY OF PERSONS MAKING FALSE CLAIMS. Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who, with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a

full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit. (R. S. §§ 3490, 5438.)

§ 232. Same; Suits. The several district courts of the United States, the supreme court of the District of Columbia, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall, wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent. (R. S. § 3491.)

§ 233. Duty of District Attorney as to Such Cases. It shall be the duty of the several district attorneys of the United States for the respective districts, for the District of Columbia, and for the several Territories, to be diligent in inquiring into any violation of the provisions of section 231 of this title by persons liable to such suit, and found within their respective districts or Territories, and to cause them to be proceeded against in due form of law for

the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of $2,000, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit. (R. S. § 3492.)

§ 234. Rights of Persons Presenting Such Suits. The person bringing said suit and prosecuting it to final judgment shall be entitled to receive one-half the amount of such forfeiture, as well as one-half the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided*, That such person shall be liable for all costs incurred by himself in the case, and shall have no claim therefor on the United States. (R. S. § 3493.)

§ 235. Limitation of Suit. Every such suit shall be commenced within six years from the commission of the act, and not afterward. (R. S. § 3494.)

Appendix B

RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES

28 U.S.C.A. following § 723c

Rule 9(b). *Fraud, Mistake, Condition of the Mind.* In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

* * * * * * * * *

Rule 11. *Signing of Pleadings.* Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

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Rule 15(a) *Amendments.* A party may amend his pleading once as a matter of course at any time before a

responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

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Rule 56—*Summary Judgment.*

(e) *Form of Affidavits; Further Testimony.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.